Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

No. 90-1838

In the Supreme Court of the United States

OCTOBER TERM, 1991

PAUL LUSKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether interstate travel with intent to commit murder for hire, in violation of former 18 U.S.C. 1952A (now 18 U.S.C. 1958), is a "crime of violence" within the meaning of 18 U.S.C. 924(c).

2. Whether consecutive sentences are permissible for carrying a firearm during crimes of violence when the firearm violations are based on co-conspirator liability.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Pinkerton v. *United States*, 328 U.S. 640 (1946)	6
United States v. *Chalan*, 812 F.2d 1302 (10th Cir. 1987)	6
United States v. *Henry*, 878 F.2d 937 (6th Cir. 1989)	6
United States v. *Luskin*, 885 F.2d 867 (4th Cir. 1989), cert. denied, 494 U.S. 1079 (1990)	3
United States v. *Torres*, 862 F.2d 1025 (3d Cir. 1987)	6

Statutes:

Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2136	3
§ 1005, 98 Stat. 2138	3
18 U.S.C. 371	2
18 U.S.C. 924	3
18 U.S.C. 924(c)	2, 3, 4, 5, 6, 7
18 U.S.C. 924(c)(1)	6
18 U.S.C. 924(c)(2)	4
18 U.S.C. 924(c)(3)	4, 5
18 U.S.C. 924(c)(3)(A)	4, 5

Statutes – Continued: Page

18 U.S.C. 924(c)(3)(B) 4, 5
18 U.S.C. 1952A (Supp. II 1984) 2, 3, 4, 5, 7
18 U.S.C. 1958 ..... 2, 5
26 U.S.C. 5861(d) 2
28 U.S.C. 2255 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1838

PAUL LUSKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-34) affirming the district court's dismissal of petitioner's motion under 28 U.S.C. 2255 is reported at 926 F.2d 372. The 1989 opinion of the court of appeals affirming petitioner's convictions (Pet. App. 40-68) is unpublished, but is noted at 885 F.2d 867 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1991. The petition for a writ of certiorari was filed on May 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1987, petitioner arranged to have his wife killed in order to avoid the financial consequences of divorce proceedings. He contacted his friend, Joe Liberto, and told Liberto about his plan. Liberto contacted his brother, Jimmy, who in turn hired Milton "Sonny" Cohen to commit the murder in exchange for a payment of $50,000 from petitioner. Cohen made his first attempt on March 9, 1987. On that day, he traveled from Maryland to Florida and shot Marie Luskin in the head, but she survived. Cohen and a confederate, James Manley, made a second attempt on May 30, 1987. Both men traveled to Florida, but again failed in their attempt to murder Marie. Prior to a third attempt on July 27, 1987, petitioner offered a $25,000 bonus if the job were completed promptly, but the third attempt failed as well. Upon returning from Florida to Baltimore by train after the third failed attempt, Cohen and Manley were arrested at the Baltimore train station. In their luggage, the police found a loaded AR-15 rifle with a laser scope, two loaded pistols, a silencer, and three and one half ounces of cocaine. Both men were arrested. Manley cooperated with the government and testified against his confederates. Pet. App. 3-4, 44-47.

2. Petitioner was convicted in the United States District Court for the District of Maryland on one count of conspiracy to commit murder for hire (18 U.S.C. 371), three counts of use of the facilities of interstate commerce with intent to commit murder for hire (18 U.S.C. 1952A (now 18 U.S.C. 1958)), three counts of carrying a firearm "in relation to any crime of violence" (18 U.S.C. 924(c)), and one count of possession of an unregistered firearm, *i.e.*, the silencer found in Manley's luggage (26 U.S.C. 5861(d)). Petitioner was sentenced to a total of 35 years' imprisonment, 15 years of it non-parolable, as follows: consecutive 10,

5, and 5 year terms for the three interstate travel offenses, consecutive 5 year non-parolable terms for each of the firearm offenses, and concurrent 5 year terms for the conspiracy and possession of a silencer offenses. Pet. App. 5-7.

3. Petitioner's convictions were affirmed on direct appeal. Pet. App. 40-68. Among other rulings, the court held that there was sufficient evidence that petitioner joined the conspiracy and was knowledgeable about Cohen's and Manley's actions; petitioner's liability for the substantive offenses committed by Cohen and Manley was premised on his liability as a co-conspirator. Pet. App. 65-66. This Court denied certiorari on April 16, 1990. 494 U.S. 1079.

4. On August 3, 1989, petitioner filed a motion under 18 U.S.C. 2255 claiming that his convictions under 18 U.S.C. 924(c) and 1952A could not stand because those statutes were not in effect at the time of his offenses. He also claimed that the three consecutive five-year sentences imposed for the Section 924(c) offenses should merge as one five-year sentence. On November 29, 1989, the district court denied petitioner's Section 2255 motion, finding that Sections 924 and 1952A became effective upon their enactment on October 12, 1984, long before petitioner's 1987 offenses. See Pub. L. No. 98-473, § 1005, 98 Stat. 2138; Pet. App. 36-39. Without discussion, the district court also rejected petitioner's claim that he could not receive three consecutive five-year sentences under Section 924(c) for the firearm violations associated with each of the three violations of Section 1952A. See Pet. App. 35.

5. The court of appeals affirmed the district court's order dismissing the Section 2255 motion. Pet. App. 1-34. Like the district court, it rejected the claim that Sections 924 and 1952A were not yet in effect at the time of petitioner's offenses. Pet. App. 33-34.

The court of appeals also rejected petitioner's claim that he could not receive consecutive sentences on the three

Section 924(c) counts. Pet. App. 7-29. The court held that multiple Section 924(c) sentences were permissible because the predicate offense for each Section 924(c) violation was a separate use of the facilities of interstate commerce with intent to commit murder for hire, in violation of 18 U.S.C. 1952A. Pet. App. 19-27.

The court of appeals also rejected petitioner's argument, raised for the first time on appeal, that a Section 1952A offense is not a "crime of violence" and thus may not serve as a predicate offense for a Section 924(c) violation. The court held that interstate travel or the use of the facilities of interstate commerce with the intent to commit murder for hire under Section 1952A has as an element the threatened use of force against another and poses a substantial risk of the use of force against another; a Section 1952A offense therefore comes within the definition of a "crime of violence" under Section 924(c)(2). Pet. App. 30-32.[1]

ARGUMENT

1. Petitioner first argues (Pet. 14-26) that use of the facilities of interstate commerce with intent to commit murder for hire is not a "crime of violence." Section 924(c) prescribes a mandatory consecutive non-parolable sentence of five years' imprisonment for "[w]hoever, during and in relation to any crime of violence * * * carries a firearm." 18 U.S.C. 924(c). Section 924(c)(3) defines a "crime of violence" as "an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may

[1] As a preliminary matter, the court of appeals ruled that petitioner could not raise this argument on collateral review, having failed to make it on direct appeal. Pet. App. 31.

be used in the course of committing the offense." Section 1952A (now Section 1958) imposes penalties on any person who "travels or causes another * * * to travel in interstate or foreign commerce, or uses or causes another * * * to use * * * any facility in interstate or foreign commerce, with intent that a murder be committed * * * as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value." 18 U.S.C. 1952A (Supp. II 1984), currently codified at 18 U.S.C. 1958.

One of the elements of Section 1952A is an intent to commit murder for hire. As the court of appeals noted (Pet. App. 31-32), the definition of "crime of violence" in Section 924(c)(3) includes both the "threatened use of physical force," 18 U.S.C. 924(c)(3)(A), and a "substantial risk" of "physical force against the person * * * of another," 18 U.S.C. 924(c)(3)(B). Unquestionably, the Section 1952A offense has as an element the "threatened use of physical force" against another, because the offense requires an intent to commit murder. Furthermore, the Section 1952A offense necessarily involves "a substantial risk" that physical force against another will be used in the course of committing the offense. In light of these explicit statutory provisions, there is no merit to petitioner's argument that interstate travel or the use of interstate commerce facilities to commit murder for hire is not a crime of violence.

2. Petitioner argues (Pet. 26-37) that it was the single conspiracy offense, not the three uses of facilities of interstate commerce, that was the predicate for the three Section 924(c) sentences. For that reason, he contends that he cannot be sentenced for three Section 924(c) violations. As the court of appeals explained, petitioner was found guilty of three separate and distinct substantive offenses of using the facilities of interstate commerce with the intent to murder for hire. Pet. App. 11-12. His criminal liability for these offenses was premised on his liability as a

co-conspirator for acts done in furtherance of the conspiracy. See *id.* at 12; *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Additionally, the court of appeals found "strong" evidence of petitioner's "ongoing involvement" in each of the three murder attempts. *Ibid.* Thus, while the court of appeals agreed (Pet. App. 19-29) that multiple Section 924(c) sentences cannot be predicated on carrying firearms in relation to a single offense, there is no factual basis for applying that legal principle to this case.[2]

---

[2] Petitioner's reliance on other court of appeals decisions is misplaced. As the court of appeals explained, the remand for resentencing in *United States* v. *Torres*, 862 F.2d 1025 (3d Cir. 1987), was based on a government concession and "did not create any analysis to be followed." Pet. App. 26-27. Under *United States* v. *Henry*, 878 F.2d 937 (6th Cir. 1989), cited by petitioner at Pet. 31-32, separate Section 924(c)(1) counts may be imposed for separate predicate offenses; contrary to petitioner's suggestion that he was liable only for a single conspiracy (Pet. 32), he was properly convicted of three separate Section 1952A predicate offenses. See Pet. App. 23. With regard to *United States* v. *Chalan*, 812 F.2d 1302 (10th Cir. 1987), also cited by petitioner (Pet. 34-35), the court of appeals agreed with *Chalan*'s general approach and found that it did not provide support for petitioner's claim. See Pet. App. 23-24.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

JULY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20853